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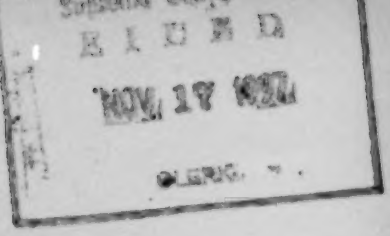

No. 97-471

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., A LAW PARTNERSHIP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

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QUESTIONS PRESENTED

1. Whether the Court should grant review to establish a bright-line rule mandating use of state certification procedures or a stay of federal proceedings in order to further the principles of "cooperative judicial federalism" even though no such principles are implicated in this case, and neither the traditional criteria for certification or a stay, nor the elements of the proposed new mandatory rule, would be met.

2. Whether the Court should grant certiorari, vacate the judgment below, and remand to the court of appeals for reconsideration of its decision in light of a recent Kansas Supreme Court decision which would not alter the outcome of the case and which the court of appeals has already had the opportunity to consider.

LIST OF PARTIES AND RULE 29.6 STATEMENT

In addition to the parties listed by the petitioner, the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Shook, Hardy & Bacon has no parent companies or subsidiaries. Shook, Hardy & Bacon L.L.P. is the successor to Shook, Hardy & Bacon. Shook, Hardy & Bacon P.C. owns Shook, Hardy & Bacon International P.C. Shook, Hardy & Bacon International P.C. owns Administrative Services S.r.l. Shook Hardy and Bacon L.L.P. owns SHB Registered Agent, Inc., a Missouri corporation and SHB Kansas Registered Agent, Inc., a Kansas corporation. Certain partners of Shook, Hardy & Bacon L.L.P. are also partners in Shook, Hardy & Bacon, a multinational partnership.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT SHOOK, HARDY & BACON

COUNTERSTATEMENT OF THE CASE

Petitioner Kansas Public Employees Retirement System ("KPERS"), as administrator of the pension fund for state and other public employees in Kansas, sued various investment advisors, accountants, lawyers, and others for damages arising from its investment of pension fund monies in a Missouri savings and loan that later failed. In its fourth petition for certiorari in this case, KPERS now seeks review of the Eighth Circuit's affirmance of the final judgment of the District Court for the Western District of Missouri dismissing KPERS' claims against respondent Shook, Hardy & Bacon ("Shook Hardy") and the other defendants as time-

barred under the two-year Kansas statutes of limitations for torts, made applicable to the claims by the Missouri borrowing statute.

KPERS' petition argues that the Eighth Circuit violated principles of "cooperative judicial federalism" by declining either to certify to the Kansas Supreme Court the question of whether KPERS' claims were immune from any statute of limitations at all under Kansas law or to stay federal proceedings while this issue was addressed by the Kansas Supreme Court in other litigation. Pet. at 12. Alternatively, KPERS complains that, following the Kansas Supreme Court's decision in that other litigation,[1] the Eighth Circuit should have granted KPERS' second petition for rehearing out of time in order to reconsider its ruling in light of that decision.

KPERS' contentions about "cooperative judicial federalism," as well as its specific procedural complaints against the Eighth Circuit, all rest on the erroneous premise that the timeliness of KPERS' claims in this case is governed by Kansas limitations law, rather than by *Missouri* law as the Eighth Circuit held in an interlocutory appeal not challenged in this petition. *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS III")*, 61 F.3d 608 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 915 (1996). Under the Missouri borrowing statute, Kansas limitations periods apply only if KPERS' claims would be fully barred under the Kansas statute, *id.* at 614; otherwise, the claims are subject to the five-year Missouri statute of limitations.

Although the parties fully briefed the timeliness of KPERS' claims under both the two-year Kansas statute and the five-year Missouri statute, the district court based its

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[1] *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997).

dismissal of the claims on KPERS' failure to bring its claims within the two-year Kansas limitations period. The district court also found, however, that on the undisputed facts, KPERS' claims arose more than five years before it filed suit against Shook Hardy and other defendants. As the defendants argued on appeal, the district court's dismissal of the claims as time-barred was therefore correct under applicable Missouri limitations law even if, for whatever reason, the claims were not also barred under the Kansas statute.

KPERS' petition virtually ignores the critical issue of which state's limitations law actually applies to its claims in this case. Although KPERS acknowledges in two passing footnote references that Missouri, not Kansas, law governs, Pet. at 6 n.8, 21 n.27, it represents in the text that "the outcome of the litigation hinges on an issue of the proper interpretation of [Kansas] law." Pet. at (i). KPERS also suggests, misleadingly, that the "outcome-determinative issue" is whether KPERS' claims are immune from any statute of limitations at all because they arose from "governmental" rather than "proprietary" activities for the purposes of Kansas limitations law. Pet. at 8-9.

KPERS' complaint about the Eighth Circuit's failure to defer to the Kansas Supreme Court on what it calls an "outcome-determinative issue" of Kansas limitations law, *id.* at 8, is wrong on two counts.[2] First, as the defendants argued to the Eighth Circuit in opposition to KPERS' second petition for rehearing, even if the claims are not barred by the Kansas statute of limitations, they are still barred by the

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[2] KPERS' description of the governmental/proprietary issue as a "issue[] of first impression" under Kansas law, *id.* at 8, is inconsistent with the Kansas Supreme Court's statement that the Eighth Circuit had simply misapplied existing precedent when it rejected KPERS' position on that issue. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d at 1338-41.

Missouri statute — the outcome is the same either way. Second, the so-called outcome-determinative Kansas law issue to which KPERS addresses its policy arguments — whether KPERS' investment of pension fund monies is a governmental or proprietary activity for Kansas limitations purposes — is essentially an academic question of historical interest only given the Kansas Supreme Court's recent ruling that KPERS' claims are subject retroactively to the special KPERS ten-year statute of limitations enacted by the Kansas legislature in 1992.[3] KPERS' petition simply misrepresents the Kansas Supreme Court's holding as resting on the governmental/proprietary issue. *See* Pet. at 7.[4]

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[3] *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d at 1346-47.

[4] The petition claims that the common issue in the various interlocutory appeals decided in the recent Kansas Supreme Court decision was "whether KPERS must satisfy the general statute-of-limitations periods applicable to claims brought by private parties." Pet. at 2. It then represents that the Supreme Court's "controlling answer" was that "general limitations periods *do not* apply because KPERS' investment function is 'governmental' rather than 'proprietary' in nature." *Id.* (emphasis in original). In fact, under the Supreme Court's decision, the governmental/proprietary distinction is irrelevant to KPERS' claims because those claims are subject to the special ten-year statute of limitations for KPERS, under which the claims were timely filed. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d at 1346-47.

The only way in which the governmental/proprietary issue figured into the Kansas Supreme Court's decision was to eliminate the need for serious consideration of the defendants' federal and state constitutional arguments against the retroactive application of the new ten-year statute to claims that had already expired. *Id.* According to the Kansas Supreme Court, because KPERS' investment claims were previously immune from any statute of limitations as arising from a governmental activity, the defendants cannot possibly have any constitutional complaint against application of the new ten-year statute to such claims. *Id.*

For all of these reasons, even if the Eighth Circuit had done what KPERS asked and had either certified the Kansas law issues to the Kansas Supreme Court or granted KPERS' second petition for rehearing in order to consider the Kansas Supreme Court's intervening decision, the outcome would have been exactly the same. Assuming that KPERS' claims would not have been barred by the new ten-year Kansas statute of limitations, the Eighth Circuit would have applied Missouri's five-year statute and affirmed the district court's dismissal of KPERS' claims as time-barred under that statute. Indeed, the parties have already briefed their respective positions on the impact of the intervening Kansas Supreme Court decision in connection with KPERS' second rehearing petition, and the Eighth Circuit has declined to rehear KPERS' appeal in light of that decision.

This plainly is not a suitable case — on the merits — in which to "further define the architecture of our system of cooperative judicial federalism," Pet. at 3, or to employ the Court's "GVR" procedure.

1. Procedural History

KPERS' ceaseless machinations to avoid or thwart the proper exercise of federal jurisdiction over its claims have produced a long and complicated procedural history which would, in itself, make this case a poor vehicle for resolution of any of the issues KPERS raises in its petition.

a. The Parties and the Claims Asserted

In 1991, KPERS filed suit in Kansas state court against the former directors of Home Savings Association, F.A. of Kansas City, Missouri ("Home Savings") and others seeking damages for losses on investments it made in Home Savings in 1986. Among the director defendants was a partner in the Kansas City law firm of Shook, Hardy & Bacon, which represented Home Savings in connection with KPERS'

investments in the thrift. The law firm was added as a defendant in 1994.

The claims asserted by KPERS are "conventional" common law or statutory tort claims seeking money damages only. *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS II")*, 60 F.3d 1304, 1306 (8th Cir. 1995); *KPERS v. Reimer & Koger Assocs., Inc. ("KPERS IV")*, 77 F.3d 1063, 1071 (8th Cir.), *cert. denied*, 117 S. Ct. 359 (1996). KPERS' claims are being pursued by private counsel under a contingency fee agreement with KPERS.

On March 17, 1992, the Home Savings director defendants moved to dismiss KPERS' claims in lieu of answering KPERS' complaint. On May 14, 1992, the Resolution Trust Corporation ("RTC") as successor-in-interest to Home Savings moved to intervene in the case to prevent KPERS from pursuing derivative claims owned by the RTC. While the RTC's motion to intervene was pending, the state court denied the Home Savings directors' motion to dismiss KPERS' petition. The Home Savings directors then filed an answer which included a third-party petition naming the RTC as a third-party defendant in the case.

b. KPERS' Attempted Ex Parte Severance of the RTC Claims and Its Motions for Remand

KPERS responded to the RTC's joinder by filing an "emergency" motion which, by KPERS' own admission, was intended solely to prevent the RTC from exercising its right to remove the case to federal court under the RTC removal statute, 12 U.S.C. § 1441a(*l*)(3)(A). *See KPERS v. Reimer & Koger Assocs., Inc. ("KPERS I")*, 4 F.3d 614, 617 (8th Cir. 1993), *cert. denied*, 511 U.S. 1126 (1994). The Kansas state trial judge granted KPERS' motion to sever the claims against the RTC in an *ex parte* hearing held without notice

to any opposing counsel. *Id.* at 616-19.[5] Notwithstanding the severance order, the RTC proceeded to exercise its statutory right to remove the case to federal court in Kansas City, Missouri, the location of Home Savings, on October 13, 1992.

KPERS sought remand of its claims to Kansas state court on three occasions. KPERS initially argued that because the third-party claims against the RTC had been severed, only those claims had been removed to federal court. In an order affirmed by the Eighth Circuit, the district court denied the remand motion, holding that because the state court's *ex parte* severance of the third-party claims was "for the sole purpose of defeating a congressionally conferred right," it violated the Supremacy Clause and was therefore void. *Id.* at 617; *see also id.* at 619 (sole purpose of the severance was to "keep the original action in state court by preventing the RTC from exercising its federal right to remove").

The RTC was subsequently dismissed as a third-party defendant. A renewed motion to remand was again denied by the district court, based in part on the extraordinary actions taken by the state court to interfere with the RTC's statutory removal right,[6] as well as the facts that significant

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[5] KPERS notified the court clerk that it wished to file the motion to sever at approximately 4:00 p.m. and was informed by the clerk that the court would stay open past its 5:00 p.m. closing time to permit filing of KPERS' motion. *Id.* KPERS then appeared *ex parte* before the Kansas trial judge, who granted the motion to sever at 5:26 p.m. without notice to opposing counsel. *Id.*

[6] The Kansas state judge who ordered the *ex parte* severance was ultimately disqualified from presiding over any KPERS failed investment litigation for actual bias against the defendants as evidenced, among other ways, by his remarks in the same summary judgment order that was affirmed by the recent Kansas Supreme Court decision on which KPERS now relies in this case.

federal judicial resources had already been invested in the case and that the RTC would likely seek to intervene again following any remand, resulting in the case returning to federal court. KPERS did not seek interlocutory review of that decision.

c. The District Court's First Ruling that KPERS Is Subject to a Statute of Limitations

On October 22, 1993, the Home Savings director defendants filed a motion for summary judgment on their statute of limitations defense. KPERS opposed the motion on the ground that its claims arose from a governmental function and thus were exempt from any statute of limitations under the Kansas doctrine of *nullum tempus occurrit regi*. *See* K.S.A. § 60-521. Alternatively, KPERS argued that if its claims were subject to a statute of limitations, it was K.S.A. § 60-522, the ten-year statute of limitations enacted in 1992 for claims asserted by KPERS.[7] KPERS did not ask the district court to certify either of these issues of Kansas state law to the Kansas Supreme Court.

The Home Savings directors' motion for summary judgment was denied in part and granted in part. First, the district court rejected their argument that Missouri, rather than Kansas, limitations law governed KPERS' claims. Second, the district court rejected KPERS' argument that its investment activity was a governmental function and held, on the contrary, that KPERS' claims arose from proprietary

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[7] The Kansas legislature enacted the ten-year statute in response to a motion by the Home Savings director defendants, while still in state court, to dismiss KPERS' claims as time-barred under the general Kansas two-and three-year statutes of limitations applicable to tort claims. *KPERS III*, 61 F.3d at 609. When the Home Savings directors later argued that the new statute did not revive claims that were already time-barred, the legislature amended the statute to provide that it would apply retroactively. *Id.*

activity and thus were subject to statutes of limitations pursuant to K.S.A. § 60-521. Third, the court ruled in KPERS' favor on the applicable limitations period, holding that K.S.A. § 60-522 applied retroactively to revive even time-barred claims and that its ten-year limitations period governed KPERS' claims. *See KPERS III*, 61 F.3d at 610-11.

d. The *KPERS III* Holding that KPERS' Claims Are Governed By Missouri's Limitations Law and Borrowing Statute

The district court certified its ruling for interlocutory appeal, and the Home Savings directors appealed from the holdings adverse to them — that KPERS' claims are subject to Kansas limitations law and that they were retroactively revived by K.S.A. § 60-522. KPERS, for its part, chose not to cross-appeal from the district court's ruling that KPERS' claims are subject to applicable statutes of limitations because they arose from proprietary, rather than governmental, activity, nor did it request certification of this issue to the Kansas Supreme Court.

While the interlocutory statute of limitations appeal was pending, the case proceeded through fact discovery, and a trial date was set for January 1996. On July 27, 1995, the Eighth Circuit issued its decision reversing the district court's denial of the defendants' summary judgment motions. *KPERS III*, 61 F.3d at 608. The Eighth Circuit, applying federal choice of law principles made applicable by the RTC's removal under 12 U.S.C. § 1441a(*l*), held that KPERS' claims are governed by the statute of limitations of the forum state, Missouri. It further held that under the Missouri borrowing statute, KPERS' claims are subject to Missouri's five-year statute of limitations unless fully barred by a shorter statute in the state where the cause originated, Kansas. Finally, the Eighth Circuit held that in Kansas,

KPERS' claims would be subject to the general two- and three-year statutes of limitations applicable to common law and statutory tort claims because the newly-enacted special ten-year statute of limitations for KPERS did not revive claims that were already time-barred. Because the Kansas limitations periods were shorter than the Missouri five-year statute, the Eighth Circuit remanded the case to the district court to determine if KPERS' claims were barred under the Kansas two- and three-year statutes. *KPERS III*, 61 F.3d at 614-15.

In a petition for rehearing, KPERS requested that the Eighth Circuit certify to the Kansas Supreme Court the question of whether the Kansas legislature intended "to apply [the new ten-year statute] to KPERS' actions that would otherwise be barred by the running of a shorter statute of limitations." Again, KPERS did not request certification of whether KPERS performs a proprietary or governmental function for statute of limitations purposes. When the Eighth Circuit denied rehearing, KPERS filed a petition for certiorari raising only the retroactivity and federal choice of law issues, which was denied on February 20, 1996.

e. KPERS' Efforts To Evade the *KPERS III* Ruling and To Disrupt the Progress of the Case

On September 29, 1995, Shook Hardy and other defendants filed summary judgment motions on their statute of limitations defenses in light of *KPERS III*. KPERS' response to *KPERS III* was a series of maneuvers which the district court and Eighth Circuit found were intended to delay the progress of the case in federal court.

On August 23, 1995, KPERS filed duplicative lawsuits in Kansas state court on its Home Savings claims against Shook Hardy and other defendants in an effort to circumvent the RTC removal statute and obtain a more favorable ruling on

the statute of limitations issues. *See KPERS IV*, 77 F.3d 1063 (affirming district court injunction against KPERS initiating any additional duplicative suits in state court based on the Home Savings investments).

On September 12, 1995, KPERS filed a third ("second renewed") motion to remand this case to state court and, at the same time, a motion for reconsideration and certification of the governmental-proprietary issue. In its order denying KPERS' motion for reconsideration, the district court described it as another "one of KPERS' attempts to avoid the impact" of *KPERS III*, raising no new issues, and noted KPERS' earlier tactical decision not to present the governmental-proprietary issue to the Eighth Circuit when it had the opportunity in the *KPERS III* appeal.[8] As to KPERS' request for certification, the district court concluded that the procedure was not available because there was no lack of controlling precedent under the existing Kansas cases, which clearly established that KPERS' investments of pension fund monies were a proprietary, not a governmental, activity.[9]

While KPERS' motions for remand and reconsideration were pending, KPERS also moved to disqualify District Judge D. Brook Bartlett. The Eighth Circuit concluded that this too was "part of a strategic and tactical plan to delay and prevent the district judge from ruling on the pending summary judgment motions" following the *KPERS III* decision. *In re KPERS ("KPERS V")*, 85 F.3d 1353, 1359-61 (8th Cir. 1996) (denying KPERS' petition for writ of mandamus to compel recusal).

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[8] *See KPERS v. Reimer & Koger Assocs., Inc.*, No. 92 CV 922, Order (W.D. Mo. Oct. 25, 1995).

[9] *Id.*

f. The District Court's Holding That KPERS' Claims Accrued More Than Five Years Before They Were Filed and Are Time-Barred

Once KPERS' tactical motions were resolved, the district court turned to the motions for summary judgment filed by the defendants pursuant to the Eighth Circuit's *KPERS III* decision. Based on the parties' voluminous summary judgment submissions and three days of oral argument, the district court determined that, on the undisputed facts, KPERS' claims had all accrued by no later than December 1986, more than five years before KPERS sued Shook Hardy and other defendants.[10] The district court also held, once again, that KPERS' claims were not immune from statutes of limitations as arising from "governmental" activities. The district court accordingly granted the defendants' summary judgment motions, dismissed all of KPERS' claims as time-barred, and entered final judgment pursuant to Fed. R. Civ. P. 54.

On appeal from the final judgment of dismissal, KPERS made its first request to the Eighth Circuit to certify the governmental-proprietary issue to the Kansas Supreme

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[10] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C. ("KPERS VI")*, 114 F.3d 679, 691 (8th Cir. 1997) (Petitioner's Appendix A ("App.") at 21a) ("district court held that the statute began to run in December 1986"), *petition for cert. filed*, 66 U.S.L.W. 3203 (U.S. Sept. 10, 1997) (No. 97-471). Among other undisputed facts supporting the district court's conclusion, the Eighth Circuit cited both press reports and memoranda sent directly to KPERS' executive secretary that established notice to KPERS of both the alleged conflicts of interest of KPERS' chairman, including his loans from banks related to Home Savings' owners, and Home Savings' failure to use the investment funds for the specific purpose presented to KPERS' board when it approved the investment. *See* App. at 16a-21a.

Court. In its May 13, 1997 decision affirming the district court, the Eighth Circuit held that the issue of whether KPERS was immune from any statute of limitations had been implicitly decided in *KPERS III* and was law of the case.[11] The Eighth Circuit then considered the summary judgment record and affirmed the district court's ruling that because the statute of limitations on KPERS' claims had begun to run by December 1986, the claims were time-barred under the two- and three-year Kansas statutes of limitations and thus under the Missouri borrowing statute.

KPERS' petition for rehearing and for rehearing *en banc* was denied by the Eighth Circuit on June 12, 1997. On June 20, 1997, the Eighth Circuit issued its mandate to the district court.

g. The Kansas Supreme Court's Recent Decision

After the Eighth Circuit had issued its mandate, the Kansas Supreme Court issued its decision on the statute of limitations issues in several KPERS failed investment cases pending in state court. *See KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321 (Kan. 1997). The Kansas Supreme Court disagreed with the Eighth Circuit's *KPERS III* decision concerning the specific Kansas limitations period applicable to KPERS, holding that KPERS' claims are subject to the special KPERS ten-year statute of limitations enacted in 1992, and not the two-and three-year statutes applicable to all other tort and statutory claims.

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[11] *See KPERS VI*, App. at 14a-15a & n.11. The Eighth Circuit discussed the merits of KPERS' governmental-proprietary arguments in *KPERS VI* only to explain why its implicit holding in *KPERS III* would have been the same even if it had expressly addressed the issue in that opinion, and therefore it was not manifestly unjust to treat the decision as the law of the case. *See id.* at 13a-14a.

KPERS then filed a second petition for rehearing requesting the Eighth Circuit to vacate its judgment in *KPERS VI* and recall its mandate to apply the Kansas Supreme Court's decision.[12] The defendants opposed the motion on the ground that application of the Kansas Supreme Court's decision on the Kansas limitations law issues would affect only the reasoning, not the result, in the Home Savings case, where the claims were also barred by the applicable five-year Missouri statute of limitations.

The Eighth Circuit denied KPERS' second petition for rehearing on September 9, 1997. On September 10, 1997, KPERS filed this — its fourth — petition for writ of certiorari in this case.

REASONS FOR DENYING THE WRIT

I. A MANDATORY CERTIFICATION OR STAY RULE IS UNNECESSARY AND WOULD BE PARTICULARLY INAPPROPRIATE IN THE CIRCUMSTANCES OF THIS CASE.

KPERS contends that principles of "cooperative judicial federalism" justify imposition of a mandatory rule compelling federal courts to certify issues of state law to state courts, or to stay federal proceedings, whenever "a State is litigating its own claims under its own law in federal court, and where the litigation turns on a state-law issue of first impression." Pet. at 12.

Principles of cooperative judicial federalism, however, are not at issue in this case, and even if they were, they are adequately protected by existing certification standards.

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[12] *See KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, Nos. 96-3262, 96-3317, 96-3680, Plaintiff-Appellant's Second Petition for Rehearing and Suggestion for Rehearing *En Banc* (8th Cir. filed July 16, 1997) ("KPERS' 2d Pet. for Reh'g").

Indeed, KPERS' proposed rule would not even apply in this case where (1) the "State" of Kansas is not a litigant, (2) Missouri, not Kansas, law provides the rule of decision, and (3) the court of appeals did not decline to certify any issue of first impression.

Application of any mandatory certification rule to the facts of this case would also run counter to the settled practice of denying requests for certification that are intended to circumvent a prior adverse ruling.

A. Federalism Concerns Are Not at Stake in this Case and Are Adequately Safeguarded By Existing Certification Standards When Presented.

1. *KPERS III*, Not the Kansas Supreme Court's Recent Decision, Is Dispositive of the Statute of Limitations Applicable in This Case.

KPERS' attack on the exercise of federal court jurisdiction in this case as an affront to Kansas state sovereignty is unfounded hyperbole. KPERS' federalism argument amounts to nothing more than a complaint that one statute of limitations governs KPERS' claims pending in Kansas state court, while a different statute governs KPERS' claims in federal court in Missouri. That result, however, has nothing to do with the Eighth Circuit's refusal to certify Kansas state law issues to the Kansas Supreme Court.

The Eighth Circuit decided in *KPERS III* that, under the federal choice of law principles applicable to this case following its removal to federal court under the RTC's § 1441a removal provision, the forum's limitations law, including its borrowing statute, would govern the timeliness of KPERS' claims. *KPERS III*, 61 F.3d at 609-14. Thus, KPERS' claims are subject to the five-year Missouri statute of limitations unless fully barred by a shorter Kansas statute. Kansas limitations law — including the Kansas Supreme

Court's recent holding that KPERS' claims are subject to the special ten-year statute for KPERS — is relevant only insofar as it affects the operation of Missouri's borrowing statute. Here, the effect is simply to subject KPERS' claims to Missouri's five-year statute in lieu of (what has now been held to be) a longer limitations period in Kansas.

It is the federal choice of law analysis established in *KPERS III* — not challenged by KPERS in its petition for certiorari — that mandates application of the five-year Missouri statute to KPERS' Home Savings claims, even though the ten-year Kansas statute applies to KPERS' other claims pending in Kansas state court. Because Kansas limitations law does not provide the rule of decision in this case, neither deferral by the Eighth Circuit pending the Kansas Supreme Court's decision in the state court cases, nor reconsideration after that decision was issued, would have created uniformity between the statutes of limitations applied in this case and in KPERS' Kansas cases.

KPERS' claim that the Eighth Circuit's decision has somehow impeded the Kansas Supreme Court's ability "to articulate [its] own law," Pet. at 15, 18, is sheer obfuscation. The Kansas Supreme Court's latest pronouncement of state limitations law applicable to KPERS will henceforth govern in those cases — in state or federal court — where Kansas law provides the rule of decision. The fact that the decision has no impact on the outcome of this particular case pending in federal court in Missouri does not impinge on principles of "cooperative judicial federalism."

2. Current Standards for Certification Adequately Safeguard Cooperative Judicial Federalism and Need No Revision.

Even if this case did present federalism concerns, the interests of federalism would be adequately protected by the existing standards governing certification of state law issues.

There is no need for a mandatory certification rule to forestall a supposed growing disregard by federal courts for state interests. Pet. at 14. Forty-four states provide a mechanism for federal courts to certify unsettled questions of state law to state high courts.[13] This Court has already instructed federal courts on the desirability of utilizing state certification procedures in cases where it is appropriate. *See, e.g., Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

Federal courts have heeded this Court's instruction and have not hesitated to avail themselves of state certification procedures *when warranted*.[14] Recent survey research shows that 83% of federal circuit judges regard certification as a practical procedure for litigants notwithstanding the attendant delay and expense. Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 67

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[13] *See* Unif. Certif. Questions of Law (1995), Prefatory Note, 12 U.L.A. 69 (1996).

[14] Support for certification among judges increased throughout the 1980's and 1990's, and the number of questions certified by federal courts is on the rise. Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. of Legis. 127, 165 (1992). Between 1990 and 1994 federal courts of appeal certified questions of state law 70% of the time that certification was sought. Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 28 (American Judicature Soc'y 1995). The frequency of certification in the Eighth Circuit is 69%, consistent with federal courts nationally. *Id.*

(American Judicature Soc'y 1995).[15] State-federal judicial councils composed of federal judges and state supreme court justices have encouraged federal judges to certify questions of law in proper cases. *Id.* at 45 n.121, 105-06. These efforts demonstrate the federal courts' sensitivity to issues of state sovereignty and an active commitment to using certification procedures where it will advance such interests.

Use of the certification procedure in a given case, however, has always "rest[ed] in the sound discretion of the federal court." *Lehman Bros.*, 416 U.S. at 391.

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Id. at 395 (Rehnquist, J., concurring). This Court has eschewed any suggestion that it should prescribe how federal courts are to go about determining state law with mechanistic approaches such as mandatory certification. *See id.* at 393 (Rehnquist, J., concurring) ("a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly in telling the courts of appeals or the district courts how to go about deciding cases"). Correctly predicting state law, while important, is not always paramount, and courts balance many

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[15] Only 8% of circuit judges reported that the practicality of certification was outweighed by considerations of delay and expense; another 8% were unsure. *Id.* Most federal judges surveyed reported being highly satisfied with their prior certification experience. *Id.* at 110. *See also* Carroll Seron, *Certifying Questions of State Law: Experience of Federal Judges* 10 (Fed. Judical Ctr. Jan. 1983) (84% of surveyed judges found procedure "extremely useful").

factors when weighing whether certification is appropriate.[16] Even where the elements of state certification procedures are met, other considerations — such as whether the request is a dilatory tactic or an attempt to circumvent an adverse ruling or will overburden a state's high court — frequently weigh against certification.[17]

Federal district and appeals court judges, considering the issues presented in light of the procedural history of a case and local certification practice, are capable of weighing the factors for and against certification. A mandatory certification rule would preempt consideration of these traditional factors.

B. The Eighth Circuit Properly Declined To Certify the Question of Whether KPERS Performs a Proprietary Function.

Under established certification standards, or even KPERS' proposed mandatory certification rule, certification of the question of whether KPERS performs a proprietary function for purposes of Kansas limitations law would not have been warranted. Applying a mandatory certification rule in this case would actually *undermine* principles of cooperative judicial federalism by promoting certification of questions not meeting any recognized certification criteria.

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[16] *See, e.g., Hatfield v. Bishop Clarkson Mem'l Hosp.*, 679 F.2d 1258, 1261 (8th Cir. 1982) ("In determining whether to exercise our discretion in favor of certification, we consider many factors.").

[17] *See, e.g.*, Goldschmidt, *supra* at 109 (federal judges should be selective in their certification so as not to unduly burden state courts and should disallow certification when sought as a dilatory tactic).

1. Certification Is Appropriate Only When There Is No Controlling State Precedent.

The standard for certification applied by the Eighth Circuit, already quite liberal, was not met in this case. The Eighth Circuit will certify an issue of state law only when there is an "absence of controlling precedent in the decisions of the [state court] which would enable this court to reach a sound decision without indulging in speculation or conjecture." *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997) (certifying issue that had never been addressed by a state appellate court).[18] The Eighth Circuit's standard is consistent with the certification procedures adopted by Kansas and the vast majority of states that provide for certification.

Like courts in virtually all states with certification procedures, the Kansas Supreme Court is empowered to answer certified questions only if there is "*no controlling precedent*" that would answer the certified question. *See* K.S.A. § 60-3201 (permitting the Kansas Supreme Court to "answer questions of law . . . as to which it appears to the certifying court there is no controlling precedent"). The Uniform Certification of Questions of Law Act (1967 Act) — the source of the Kansas certification procedure and that of 28 other states — also contains the "no controlling precedent" restriction. *See* Unif. Certif. Questions of Law Act (1967 Act), 12 U.L.A. 3 (Supp. 1997) (Table of Jurisdictions Wherein Act Has Been Adopted). The Act was recently revised to "make it clear that certification is appropriate only when there is no 'controlling constitutional provision, statute or appellate decision' in the receiving

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[18] *See also Perkins v. Clark Equip. Co.*, 823 F.2d 207, 209 (8th Cir. 1987) ("without a 'close' question of state law or the lack of state sources, a federal court should determine all the issues before it").

State" and that the existence of controlling precedent is "a barrier to answering a certified question." Unif. Certif. Questions of Law (1995) § 2 cmt., § 3 cmt., 12 U.L.A. 72-73 (1996).

Moreover, certification has never been considered appropriate where there exists in state law a settled analytical framework to resolve the issue, and certification would be nothing more than a request for the state court to apply the analysis to new facts.[19] In this case, the district court and Eighth Circuit concluded that Kansas Supreme Court precedent expressly holding that KPERS performs a proprietary function, as well as the settled criteria applied by the Kansas Supreme Court to determine when a state agency is engaged in proprietary activity, clearly established that KPERS' investment activity was a proprietary function. Indeed, the courts below found authority from *every* branch of Kansas government supporting this conclusion.[20] Thus, even under KPERS' proposed certification rule — mandating certification of "*state-law issue[s] of first impression*," Pet. at 12 (emphasis added) — certification would not have been proper in this case.

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[19] *See, e.g., In re Medill*, 119 B.R. 685, 688 (Bankr. D. Minn. 1990) ("The lines of authority for the present inquiry are settled, and certification is not warranted."); *Jefferson v. Lead Indus. Ass'n*, 106 F.3d 1245, 1247 (5th Cir. 1997) ("Alone, the absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification."); *Swearingen v. Owens-Corning Fiberglass Corp.*, 968 F.2d 559, 564 (5th Cir. 1992) ("under the plain language of [the statute], [the] decisional analysis is relatively straightforward" even without a high court opinion directly confronting the issue).

[20] *See KPERS VI*, 114 F.3d at 687 (citing *In re Midland Indus.*, 703 P.2d 840, 843 (Kan. 1985), and *Shapiro v. KPERS*, 532 P.2d 1081 (Kan. 1975)); 79 Op. Att'y Gen. Kan. 55, 1979 Kan. AG LEXIS 262, at *7-8 (1979).

The fact that the Kansas Supreme Court subsequently disagreed with the federal courts' interpretation of existing precedent does not alter the conclusion that, at the time certification was requested, it was not warranted. Otherwise, the ever-present possibility of an incorrect decision would require the federal courts to certify all state law issues to the state courts in every case.

2. Certification Is Never Appropriate When Sought To Circumvent an Adverse Ruling by the Federal Court.

Certification of the governmental-proprietary question would not have been proper in this case even if the elements of the Kansas certification statute were met. The "right time to certify a question *is before the first federal decision on the point*. Certification eliminates the need to expend judicial resources predicting how another court will decide a question. Once [a federal court has] invested the time and effort to make the prediction, the costs have been sunk." *National Cycle, Inc. v. Savoy Reinsurance Co.*, 938 F.2d 61, 64 (7th Cir. 1991) (emphasis added).

In the Eighth Circuit, as in other circuits, certification is denied when it is sought only after the federal court has handed the movant an adverse ruling:

> The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision. Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present.

Perkins v. Clark Equip. Co., 823 F.2d 207, 210 (8th Cir. 1987).[21]

KPERS made a tactical decision not to seek certification of the question of whether KPERS performs a proprietary function, and thus is immune from otherwise applicable Kansas statutes of limitations, until *after* the district court had expressly rejected this argument and after the Eighth Circuit had held in *KPERS III* that KPERS' claims are subject to the two- and three-year Kansas statutes through operation of the Missouri borrowing statute. As the district court found, KPERS' ultimate decision to request certification of the governmental/proprietary issue, after the case had been remanded for application of the Eighth Circuit's *KPERS III* decision, was nothing other than an "attempt[] to avoid the impact of [that] decision." *KPERS v. Reimer & Koger Assocs., Inc.*, No. 92 CV 922, Order (W.D. Mo. Oct. 25, 1995). For this reason alone, the request was properly denied.

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[21] *See also In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (movant should not be allowed "a second chance at victory" after an adverse ruling when "district court employed a reasonable interpretation of state law"); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (denying certification sought on appeal after loss in district court); *Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994) ("[w]e generally will not certify . . . when the requesting party seeks certification only after having received an adverse decision"); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) (certification not available where sought "after the district court made a decision unfavorable" to plaintiff); *Boston Car Co. v Acura Auto. Div.*, 971 F.2d 811, 817 n.3 (1st Cir. 1992) ("We agree with the Eighth Circuit that the practice of requesting certification after an adverse judgment has been entered should be discouraged.").

3. A Mandatory Stay is Not Called For in this Case.

KPERS' argument that a stay of proceedings in the Eighth Circuit was, or should be, mandatory in the circumstances of this case warrants little attention. Abstention presents "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and its invocation "is the exception, not the rule." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) (quotations omitted).[22] The same reasons that make a mandatory stay pending certification inappropriate in a case like this would also render abstention without certification improper.

Moreover, in contrast to the "vital" and "truly novel" state law issues involved in *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968), which KPERS contends is controlling here, Pet. at 16, this case is a commonplace tort action for money damages. *See KPERS IV*, 77 F.3d at 1071 ("KPERS has sued several defendants to recover money it lost in a bad investment. This case only requires the conduct of the defendants be measured against the duties imposed by tort and securities law.").

Kaiser is also distinguishable in that it was a diversity case where the pending state court proceedings provided the law of decision for the federal court. As a result, a stay of the federal case was deemed appropriate to ensure that the parties would be given the benefit of the same law applied by the state court. The potential for inconsistency raised in

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[22] *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (as a general rule, "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred"); *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1505 (8th Cir. 1992) ("Our own precedent demands a narrow view of the abstention issue.").

Kaiser, however, would not be obviated in this case by deferring to the Kansas Supreme Court, since federal choice of law principles mandate application of Missouri's statute of limitations and borrowing statute, not Kansas limitations law. The Kansas Supreme Court's holding that KPERS is subject to a ten-year statute of limitations merely alters the analysis under the Missouri borrowing statute; it does not result in application of the ten-year Kansas statute.

II. BECAUSE THE COURT OF APPEALS HAS ALREADY HAD AN OPPORTUNITY TO CONSIDER THE IMPACT OF THE RECENT KANSAS SUPREME COURT OPINION ON ITS OWN DECISION IN THIS CASE, GRANTING CERTIORARI TO VACATE AND REMAND WOULD SERVE NO PURPOSE.

This Court has used the "grant, vacate and remand" procedure where:

> intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co., 117 S. Ct. 1731, 1732-33 (1997). The criteria for issuing a GVR do not exist in this case.

First, the Eighth Circuit has already considered the effect of the Kansas Supreme Court's recent decision on the judgment below. KPERS brought the decision to the attention of the Eighth Circuit in its second petition for

rehearing,[23] where it argued, as it does here, that the Eighth Circuit was required to grant a rehearing or recall its mandate to conform its ruling to the Kansas Supreme Court's decision. *See* KPERS' 2d Pet. for Reh'g. As the defendants argued in opposition to KPERS' second rehearing petition, application of the Kansas Supreme Court's opinion would not change the outcome of this case because even if the special ten-year Kansas statute of limitations is applicable to KPERS' claims (rather than the two-year statute applied by the district court), the claims are still barred by the five-year Missouri statute. For this reason, reconsideration of the district court's judgment in light of the Kansas Supreme Court's decision would merely result in affirmance on that alternative ground, and GVR would be a pointless exercise.

KPERS buries its discussion of this alternative ground for affirmance in the final footnote of its petition, where it raises several cryptic arguments for why the result in this case might be different in light of the Kansas Supreme Court's recent decision. Pet. 21 n.27. The simple response to all of those arguments is that the effect of the Missouri statute of limitations on the record in this case was fully briefed and argued in the district court and on appeal, and the district court's ruling, upheld by the Eighth Circuit, that KPERS' claims all accrued more than five years before it filed suit is dispositive under the five-year Missouri statute of limitations.

Even assuming KPERS could overcome the barrier of the Missouri five-year statute, however, certiorari would still not be warranted here because the sole issues that would be addressed in further proceedings would not involve the sovereign interests of Kansas in the application of its *own*

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[23] *See* KPERS' 2d Pet. for Reh'g.

state statutes, but merely the proper application of the Missouri statute in a single case.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

Respectfully submitted,

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